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No. 94-1172

In The

Supreme Court of the United States

October Term, 1994

SKYLINE LODGE, INC.,

Petitioner,

vs.

PHYLLIS DELANEY, KAREN WATTS, BRENDA LACKEY AND MARLENE SCHEIDT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Ohio Courts violated Petitioners Due Process Rights where Petitioner was given a full opportunity to present evidence on the amount of punitive damages to be awarded against it but failed to offer or request to offer any such evidence.

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BRIEF IN OPPOSITION

STATEMENT OF THE FACTS

Respondents Phyllis Delaney, Karen Watts, Brenda Lackey and Marlene Scheidt were waitresses at a restaurant owned and operated by Petitioner Skyline Lodge, Inc. Respondents sued Skyline alleging that the restaurant manager, Peter Boucher, sexually harassed them by the use of offensive language. As the Hamilton County, Ohio Court of Appeals noted:

> Boucher told . . . jokes in the public and work areas of the restaurant. Boucher made off-color remarks in front of customers while placing his arm around the appellees and drawing them

> close to him. He referred to the female waitresses as "cunts" and "bitches." He made disparaging, unwelcome remarks about Delaney's breasts in public. He told Scheidt that she could go home early and "give her husband some," that he bet she got "laid" last night and that he presumed she was good in bed.

(A. 28).

Respondents reported the harassment to Boucher's supervisor, Gary Bradford. Although Bradford claimed at trial to have warned Boucher to cease his conduct, Defendant kept Respondents under Boucher's supervision. Shortly afterwards, Boucher threatened Respondents Delaney and Scheidt with a gun, continued to use offensive language in Respondent's presence, lowered his pants while staring at Respondent Scheidt for an extended period of time, and fired Respondent Delaney. In the words of the Court of Appeals:

> We conclude that sufficient evidence was adduced to permit reasonable minds to conclude that Appellant abandoned Appellees to their tormentor.

(A. 40).

On September 9, 1992, a jury found for Respondents and awarded them a total of $100,000.00 in compensatory damages. The amount of punitive damages was initially left to the jury, in contravention of ORC § 2315.21 which calls for the Court to make the decision.[1] The jury

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[1] The Ohio Supreme Court has recently invalidated § 2315.21, once again leaving the issue for the jury. *Zoppo v. Homestead Insurance Co.*, 71 Ohio St.3d 552, 1994 WL 723009 (Dec. 30, 1994).

awarded a total of $108,000.00 in punitive damages to the four Respondents. Subsequently the Court used the jury verdict as an advisory verdict and adopted its findings as its own. The Court of Appeals found:

> . . . no prejudice to the Appellant, as the trial court, in response to Appellant's motion for judgment notwithstanding the verdict, adopted the amount of damages decided by the jury as reasonable and appropriate. As the amount of damages was ultimately determined by the court, no prejudice arose. The third assignment of error is without merit.

(A. 39).

Petitioner did not claim in either the trial court or the Court of Appeals that the adoption by the Trial Court of the jury's determination prevented it from presenting evidence regarding the amount of punitive damages. Nor did Petitioner ever request to present such evidence. The issue was raised for the first time in Petitioner's motion to certify to the Ohio Supreme Court which was denied. Petitioner now seeks review by this Court.

REASONS FOR DENYING THE WRIT

Petitioner alleges that it was prevented from presenting evidence regarding the amount of punitive damages. Apparently Petitioner is claiming it assumed it would be given an opportunity to present evidence regarding the amount of punitives when the issue was addressed by the Trial Court. Petitioner claims it was denied due process when the Trial Court improperly allowed the jury to decide the amount of punitive damages and subsequently

adopted those damages without an evidentiary hearing. Petitioner however fails to indicate why it assumed, in light of the complete absence of statutory authority or any indication from the Trial Court, that there would be a separate hearing on the amount of punitive damages. The trial court did not reject, or prevent Petitioner from offering, evidence regarding the amount of punitive damages. Nor did the trial court lull Petitioner into assuming it would be given an opportunity to present such evidence in a subsequent hearing. There simply was no conduct on the part of the trial court which operated to deprive Petitioner of its right to offer evidence on the amount of punitive damages. Petitioner did not request to put on additional evidence when the Trial Court indicated it would allow the jury to decide the amount of punitive damages. Petitioner failed to request an evidentiary hearing in response to the Trial Court's adoption of the jury's award. Nor did Petitioner argue in its motion JNOV that the Court should not adopt the jury's award of punitive damages because it was not given an opportunity to present evidence regarding the appropriate amount of punitive damages. There is nothing in the record that suggests the trial court would have rejected Petitioner's request to offer evidence on the amount of punitive damages at any stage of the proceedings had Petitioner simply requested an opportunity to present such evidence. Neither circumstance nor the trial court prevented Petitioner from offering evidence on the amount of punitive damages. Petitioner was not denied due process, it simply failed to take advantage of the process.

Petitioner also failed to argue in the Court of Appeals that it was prevented from offering evidence regarding

the appropriate amount of punitive damages. The issue was raised for the first time in Petitioner's appeal to the Ohio Supreme Court which was rejected.

Petitioner had full opportunity to present any evidence it wanted to at trial but failed to do so. After the trial Petitioner had a full opportunity to argue that the Trial Court should not adopt the jury's award of punitive damages because it was denied an opportunity to present evidence on the amount of punitive damages. Respondent failed to make such arguments until over two years later when it petitioned the Ohio Supreme Court for review. It is questionable whether Petitioner ever intended to put on evidence regarding the amount of punitive damages. If so, it waived that right by failing to offer any such evidence at trial and by failing to request a separate hearing to present such evidence after trial. The Trial Court took no action to prevent Petitioner from offering the evidence it now claims it wished to offer.

CONCLUSION

For all the above reasons, the petition should be denied.

Respectfully submitted,

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